

In the Matter of )  
 )  
 Communications Assistance for ) CC Docket No. 97-213  
 Law Enforcement Act )

## COMMENTS OF CINGULAR WIRELESS LLC

<sup>1</sup>Cingular is the new joint venture between the domestic wireless operations of SBC Communications, Inc. (“SBC”) and BellSouth Corporation (“BellSouth”), and provides wireless voice and data Commercial Mobile Radio Services (“CMRS”) to more than 19 million customers in 38 states, the District of Columbia and two U.S. territories.

<sup>3</sup>See *Communications Assistance for Law Enforcement Act*, Third Report and Order, 14 F.C.C.R. 16,794 (1999) (“Third Report and Order”), vacated in part and remanded, *United States Telecom Ass’n v. FCC*, 227 F.3d 450 (D.C. Cir. 2000).

## **I. CALEA'S DEFINITION OF "CALL-IDENTIFYING INFORMATION" DOES NOT INCLUDE THE FOUR PUNCH LIST CAPABILITIES**

Law enforcement has failed to demonstrate, and the Commission cannot find, that the industry standard J-STD-025 (the "J-Standard") itself is deficient. Even if a punch list item were considered a form of call-identifying information, the Commission may not modify the J-Standard or impose new punch list capabilities on carriers, as statutory prerequisites are not satisfied.

### **A. The J-Standard Definition is Consistent with CALEA and Not Deficient**

Section 102(2) of CALEA, 47 U.S.C. § 1001(2), defines "call-identifying information" as "dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber by means of any equipment, facility, or service of a telecommunications carrier." In CALEA's legislative history, Congress stated:

For voice communications, this information is typically the electronic pulses, audio tones, or signalling messages *that identify the numbers dialed or otherwise transmitted for the purpose of routing calls through the telecommunications carrier's network*. In pen register investigations, these pulses, tones, or messages identify the *numbers dialed* from the facility that is the subject of the court order or other lawful authorization. In trap and trace investigations, these are the incoming pulses, tones, or messages which identify *the originating number of the facility* from which the call was placed and which are captured when directed to the facility that is the subject of the court order or authorization. *Other dialing tones that may be generated by the sender that are used to signal customer premises equipment of the recipient are not to be treated as call-identifying information.*<sup>4</sup>

While the Court determined that "Congress may well have intended the definition to cover something more than just the 'dialing . . . information' conveyed by telephone numbers," it also noted that even the Commission did not contend that the "'unambiguously expressed intent of Congress' . . . require[d] every one of the challenged assistance capabilities."<sup>5</sup>

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<sup>4</sup>H.R. Rep. No. 103-827, at 21 (1994) (emphasis added) ("House Report").

<sup>5</sup>See *USTA v. FCC*, 227 F.3d at 459, 463. For example, the Court found reasonable the conclusion that wireless call location information derived from the signaling used to set up a call constituted call-identifying information.

Explaining that “Congress gave the telecommunications industry the first crack at developing standards, authorizing the Commission to alter those standards only if it found them deficient,” the Court determined that the Commission may not modify the J-Standard’s definition of call-identifying information “without first identifying its deficiencies.”<sup>6</sup> This definition provides that:

[D]estination is the number of the party to which a call is being made (*e.g.*, called party); direction is the number to which a call is re-directed or the number from which it came, either incoming or outgoing (*e.g.*, redirected-to party or redirected-from party); origin is the number of the party initiating a call (*e.g.*, calling party); and termination is the number of the party ultimately receiving a call (*e.g.*, answering party).<sup>7</sup>

Importantly, the Court did not determine whether the J-Standard is deficient. Thus, the Commission must identify any deficiencies in the J-Standard definition as a prerequisite to its modification.

The J-Standard definition is not deficient. Rather, the J-Standard follows Congress’ instruction that CALEA’s capability assistance requirements be narrowly interpreted, and includes only the information traditionally provided in response to Title III orders or other lawful authorizations.<sup>8</sup> The J-Standard adheres to Congress’ admonition that the information provided to law enforcement include only that which the carrier uses for call routing.<sup>9</sup>

Information that is not maintained or used by the carrier for the purpose of originating, directing, routing, or terminating a call is not call-identifying information, insofar as that carrier (or CALEA) is concerned. For example, wireless carriers do not use DTMF dialed digit tones for placement of calls; all of the information such carriers use for originating, directing, routing, or terminating a call is conveyed by other means. As a result, the carrier has neither the need nor the capability to intercept and process DTMF. Where a carrier does not use -- and has no reason to use -- such tones for

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<sup>6</sup>*Id.* at 460-61.

<sup>7</sup>*See* J-STD-025 § 3.0.

<sup>8</sup>*See* BellSouth Comments at 11.

<sup>9</sup>*See* House Report at 22.

processing a call, information concerning the digits that such tones represent cannot be considered call-identifying information. The DTMF tones, insofar as the carrier is concerned, are simply call content -- even if the called party happens to be a long distance carrier that uses the tones to connect a call. Indeed, the House Report emphasized that tones not used by a carrier for call routing through the carrier's network, serving only to interact with distant equipment, are *not* call-identifying information.<sup>10</sup>

**B. Call-Identifying Information Beyond that Defined in the J-Standard Must Meet Other Statutory Prerequisites**

Even assuming *arguendo* that call-identifying information may include information beyond that defined in the J-Standard, the punch list items nevertheless are not supported by CALEA's statutory provisions or legislative purpose.<sup>11</sup> To pass muster, "the key statutory terms -- origin, direction, destination, and termination"-- must cover, based on a reasoned analysis and explanation, "the wide variety of information required by the punch list."<sup>12</sup> Moreover, even in the unlikely event that the punch list capabilities fall within the statutory parameters, that does not end the inquiry.

The Court made particular note of "CALEA's unique structure" -- pursuant to which carriers need not provide to law enforcement information that arguably constitutes call-identifying information if other statutory prerequisites are not satisfied.<sup>13</sup> For example, CALEA expressly prohibits law enforcement from "requir[ing] any specific design of equipment, facilities, services, features, or system configurations."<sup>14</sup> To the extent that a punch list capability effectively requires a "specific design" of

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<sup>10</sup>*See id.* at 21.

<sup>11</sup>*See Troy Corp. v. Browner*, 120 F.3d 277, 285 (D.C. Cir. 1997) (agency's interpretation must be "reasonable and consistent with the statutory purpose"); *City of Cleveland v. U.S. Nuclear Regulatory Comm'n*, 68 F.3d 1361, 1367 (D.C. Cir. 1995) (same).

<sup>12</sup>*See USTA v. FCC*, 227 F.3d at 460.

<sup>13</sup>*See id.* at 460-62.

<sup>14</sup>47 U.S.C. § 1002(b)(1)(A).

a carrier's telecommunications network, it is prohibited. Moreover, as the Court explained, any Commission decision to modify the J-Standard must "meet the assistance capability requirements . . . by cost-effective methods" and "minimize the cost of such compliance on residential ratepayers."<sup>15</sup> In this regard, the Commission must "compare the cost of implementing the punch list capabilities with the cost of obtaining the same information through alternative means" and address the impact of these requirements on residential telephone rates.<sup>16</sup>

As a related matter, any punch list requirement must meet the statutory prerequisite that call-identifying information "*is reasonably available* to the carrier."<sup>17</sup> This is reflected in the J-Standard itself, which defines "reasonably available" as information "present at an Intercept Access Point for call processing purposes."<sup>18</sup> Simply put, the information must, at absolute minimum, be accessible to the carrier as a technical matter, and carriers must have a reason to access the information, such that "the carrier does not have to modify its system to make it available."<sup>19</sup> Finally, the Court emphasized that the Commission must protect "the privacy and security of communications and call-identifying information not authorized to be intercepted."<sup>20</sup> Importantly, the cost to law enforcement agencies of alternative solutions may *not* be the sole basis for imposing a capability on carriers.<sup>21</sup>

CALEA plainly requires that before imposing any of the punch list capabilities, the Commission must, in each case, find that the item under consideration constitutes call-identifying information,

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<sup>15</sup>*USTA v. FCC*, 227 F.3d at 461 (citing 47 U.S.C. §§ 1006(b)(1), (3)).

<sup>16</sup>*See id.* Cingular has not been able to ascertain cost information on the four punch list items. Repeated inquiries of various vendors have yielded no results. Cingular will continue efforts to determine such costs, and looks forward to the comments of other parties to see if real cost figures are made available. It is Cingular's considered judgment, however, that the cost of implementing these punch list items will equal or exceed the cost of implementing the J-Standard items.

<sup>17</sup>47 U.S.C. § 1002(a)(2) (emphasis added).

<sup>18</sup>J-STD-025 § 4.2.1.

<sup>19</sup>*See* House Report at 22; TIA Comments at 24-25; *see also* BellSouth Comments at 11.

<sup>20</sup>*See USTA v. FCC*, 227 F.3d at 462.

<sup>21</sup>*Id.*

explain why that is the case, and account for all of these statutory prerequisites. As discussed below, imposition of *any* of the four punch list capabilities would contravene these requirements.

## **II. THE FOUR PUNCH LIST ITEMS ARE NOT CALL-IDENTIFYING INFORMATION AND DO NOT MEET OTHER CALEA REQUIREMENTS**

The record in this proceeding already shows that information law enforcement would receive under the four punch list capabilities at issue is not limited to call-identifying information. Even where a punch list capability arguably involves some call-identifying information, other statutory prerequisites preclude the Commission from imposing the capability on carriers.

### **A. Dialed Digit Extraction**

Not all of the information involved in dialed digit extraction is call-identifying information and, moreover, such information is not reasonably available to the carrier.<sup>22</sup> Indeed, if a carrier does not use DTMF tones for origination, direction, routing, or termination of calls, then such tones will *never* be call-identifying information as far as that particular carrier is concerned. While the Commission determined that “*some* digits dialed by a subject after connecting to a carrier other than the originating carrier are call-identifying information,”<sup>23</sup> this will only be the case if the carrier in fact uses *some* of the post-cut-through dialed digit tones for call-identifying purposes. In the case of wireless carriers, however, dialed-digit tones are not used for any of the functions within the definition of call-identifying information. The tones are not separated out and used by the carrier; they are simply call content.<sup>24</sup> As discussed above, the fact that some tones may be used by *another* carrier for processing a call does not make them call-identifying information as far as the wireless carrier (or CALEA) is concerned.

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<sup>22</sup>BellSouth Comments at 18; SBC Comments at 17; *see also* AirTouch Comments at 23-24.

<sup>23</sup>*Third Report and Order*, 14 F.C.C.R. at 16,844 ¶ 119.

<sup>24</sup>Dialed digits are an audio, not a digital signal. To segregate this information, the carrier, pursuant to a Title III order, would have to send the signals to an external system that would monitor the audio signal for digital digits -- a functionality nonexistent in the mobile switch today. Carriers would have to add additional switch capacity and adjunct equipment to meet this punch list item.

Even if dialed-digit tones that are ultimately used by another carrier for call routing were, arguably, call-identifying information for a wireless carrier, the Commission would have to demonstrate that the other statutory criteria are satisfied before requiring the carrier to provide them to law enforcement as call-identifying information. The Commission, however, can satisfy none of these criteria. First, dialed digits are not “reasonably available” to the wireless carrier. Wireless carriers do not have dialed-digit extraction hardware because they have no need to process DTMF tone digits. Thus, these digits cannot reasonably be isolated from other call content. In addition, even if a wireless carrier were to install DTMF tone extraction equipment, the carrier could not distinguish tones ultimately used by another carrier for placing calls from tones used for other purposes. As a result, even DTMF decoders would not make the supposedly call-identifying tones “reasonably available.”<sup>25</sup>

The fact that a wireless carrier cannot isolate the call-identifying tones from those that are purely call content precludes the provision of all dialed digit tones except in response to a Title III order. The Court rejected the argument that law enforcement’s purported need to obtain such information from a carrier without a Title III order outweighs the possible risks to privacy.<sup>26</sup> As numerous parties noted in earlier comments, a Title III order is necessary for law enforcement to obtain call content, and there are alternatives available to law enforcement.<sup>27</sup> The record in this proceeding overwhelmingly demonstrates that this punch list capability simply cannot “protect the privacy and security of communications not authorized to be intercepted.”

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<sup>25</sup>See AirTouch Comments at 23-27. Cingular cannot confirm that technology exists to screen out non-call-identifying information or call content, such as credit card and bankcard numbers from digits used by a long distance carrier for setting up a call.

<sup>26</sup>*USTA v. FCC*, 227 F.3d at 462.

<sup>27</sup>See Ameritech Comments at 12-13; BellSouth Comments at 18; PCIA Comments at 33-34; TIA Comments at 23.

Furthermore, dialed digit extraction will ultimately affect the rates paid by residential customers. The cost to a wireless carrier of dialed digit extraction will be very high, as additional hardware and software are required to detect and extract DTMF dialed digit tones. Moreover, if technology is developed to separate call-identifying digits from those that are purely call content, the cost will be even higher. Those costs, if not reimbursed by law enforcement, will ultimately be passed on to consumers. Before imposing this capability on wireline and wireless carriers, the Commission must -- at minimum -- ensure that the technology exists and establish credible evidence of what the costs will be. Given the absence of such technology and the expected costs involved, Cingular submits that the Commission cannot mandate dialed digit extraction without also taking responsibility for raising residential rates.

Finally, there is a readily-available low-cost (for residential ratepayers and carriers) alternative to this punch list capability. Consistent with the Court's opinion, dialed digits are reasonably available -- at law enforcement's expense and without raising residential rates -- through a Title III content intercept.<sup>28</sup> In this regard also, by requiring the provision of call content without a Title III order, imposing this punch list capability would contravene Congress' intent that CALEA "provide law enforcement no more and no less access to information than it had in the past."<sup>29</sup>

#### **B. Party Hold/Join/Drop**

The Commission determined that this information is call-identifying information on the basis that party join information "appears to identify the origin of a communication; party drop, the termination of a communication; and party hold, the temporary origin, temporary termination, or re-direction of a communication."<sup>30</sup> To the contrary, however, such information is not call-identifying information because it has no relevance to the routing of a call through a carrier's network. This

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<sup>28</sup>*See supra* note 27; *USTA v. FCC*, 227 F.3d at 462.

<sup>29</sup>*USTA v. FCC*, 227 F.3d at 455 (quoting House Report at 22).

<sup>30</sup>*Third Report and Order*, 14 F.C.C.R. at 16827, ¶ 74.



capability would effectively require carriers to create investigative and evidentiary information beyond what carriers have traditionally provided to law enforcement. Furthermore, even assuming *arguendo* that such information is call-identifying, it is not reasonably available to carriers. The J-Standard itself was modified to address law enforcement's concerns, and any additional capabilities are unwarranted.<sup>31</sup>

### **C. Subject-Initiated Dialing and Signaling Information**

The Commission's determination that this information constitutes call-identifying information is flawed, in that no signaling information is provided that would identify the direction or destination of a call.<sup>32</sup> Pen registers at most capture the transmission of tones used for such services and features, but do not identify "the effects of the transmission of those tones as resulting from the party's activation or deactivation of call forwarding."<sup>33</sup> This capability also implicates the requirement that a capability sufficiently protect "the privacy and security of communications and call-identifying information not authorized to be intercepted." Moreover, the fact that law enforcement has incidentally detected such information does not render it "call-identifying" for purposes of CALEA.<sup>34</sup> Finally, this capability would impose significant costs on carriers and may necessitate design changes, contrary to CALEA.<sup>35</sup>

### **D. In-Band and Out-of-Band Signaling Information**

The Commission determined that "*some* in-band and out-of-band signaling," including ringing and busy signals, call waiting or stutter dial tone, and busy, fast busy, and audible ringing tone, are

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<sup>31</sup>See TIA Comments at 28.

<sup>32</sup>*Communications Assistance for Law Enforcement Act, Further Notice of Proposed Rulemaking*, 13 F.C.C.R. 22632, 22673-74 ¶¶ 91-93 (1998). This includes call-forwarding and call-waiting signaling information, and signaling data indicating that the subject is accessing voice mail.

<sup>33</sup>AirTouch Communications Comments at 17; *see also* TIA Comments at 31.

<sup>34</sup>BellSouth Comments at 16; CTIA Comments at 29-30.

<sup>35</sup>See AirTouch Communications Comments at 17-18; PCIA Comments at 28 (because "detection and collection of off-hook indicators occurs in a 'line module' that is separate from the main processor of the switch . . . making this information available to the main processor . . . may require fundamental, and expensive, modifications to switch design").

“call-identifying” and reasonably available to the network.<sup>36</sup> Most of these tones have nothing to do with call routing and, in any event, cannot be detected from the network or the originating or terminating switches. As such, they are not reasonably available to carriers. To the extent that these signals can be audibly detected they can already be obtained through a properly authorized Title III intercept.<sup>37</sup> This capability thus raises significant privacy issues. Finally, implementing this capability would require the widespread deployment of signal detection equipment, at significant cost to residential ratepayers.<sup>38</sup>


### CONCLUSION

For the foregoing reasons, the Commission should not and may not impose on carriers the four punch list capabilities remanded to the Commission.

Respectfully submitted,

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<sup>36</sup>*Third Report and Order*, 14 F.C.C.R. at 16832 ¶ 89.

<sup>37</sup>*See* SBC Comments at 14; AirTouch Comments at 19; BellSouth Comments at 17.

<sup>38</sup>*See* BellSouth Comments at 17; TIA Comments at 32-33.